IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

WP(C).No. 28570 of 2007(A)

PETITIONERS/RESPONDENT 2 ON WARDS IN FDIA 46/07 INOS NO. 92/95 FDIA 47/07 IN OS NO. 125/95/ PLAINTILL AND DEFENDENTS 2 ON WARDS IN OS NO. 92/95 AND 125/95- MUNSIFF NADAPURAM.

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1. THANIYULLA PARAMBATH KUMARAN,
S/O. RAYARAN, AGED 53 YEARS, AGRICULTURIST,
VELLIYODE AMSOM DESOM, VATAKARA TALUK,
KOZHIKODE DISTRICT, KERALA STATE.

2. THANIYULLA PARAMBATH NANU, S/O. RAYARAN,
AGED 41 YEARS, AGRICULTURIST, VELLIYODE AMSOM
DESOM, VATAKARA TALUK, KOZHIKODE DISTRICT,
KERALA STATE.

3. THANIYULLA PARAMBATH BALAN, S/O.
RAYARAN, AGED 39 YEARS, AGRICULTURIST,
VELLIYODE AMSOM DESOM, VATAKARA TALUK,
KOZHIKODE DISTRICT, KERALA STATE.

4. PARU, D/O. RAYARAN,
RESIDING AT KANDOTH POYIL, HOUSE WIFE,
VELLIYODE AMSOM DESOM, VATAKARA TALUK,
KOZHIKODE DISTRICT, KERALA STATE.

BY ADV. SRI.B.KRISHNAN
SRI.R.PARTHASARATHY
SRI.N.M.RAJAGOPAL

WP(C) NO: 28570/2007 A

RESPONDENTS/IST RESPONDENT IN FDIA 46/07 IN OS NO. 92/95 FDIA 47/07 IN OS NO. 125/95/IST DEFENDANT IN OS 92/95 AND 125/95 MUNSIFF NADAPURAM.

THANIYULLA PARAMBATH KANNAN, S/O. RAYARAN, AGED 49 YEARS, AGRICULTURIST, VELLIYODE AMSOM DESOM, VATAKARA TALUK, KOZHIKODE DISTRICT, KERALA STATE.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 26/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.KRISHNAN, J

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W.P.(C) No.28570 OF 2007

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Dated this the 26th day of September 2007

JUDGMENT

This writ petition is preferred against the common order in I.A.Nos. 632 & 633 of 2007 in FDIA No.46/2007 in O.S.No.92 of 1995 of the Munsiff's Court, Nadapuram. The parties filed two applications as I.A.Nos.632 & 633 of 2007 and the court below recalled the Advocate Commissioner in I.A.No.632 of 2007 and appointed a new Commissioner for effecting partition of the property in terms of the preliminary decree passed in O.S.Nos.92 & 125/2005. The court also dismissed the share list submitted by the parties and directed the Commissioner to effect the division of the property. The brief facts necessary for the disposal of this writ petition are stated as follows: Two suits for partition were filed as O.S.No.92 of 1995 and O.S.No.125 of 1995 and the matter reached finality and a preliminary decree has been passed declaring the right of the parties. In one case, i.e. in O.S.No.92 of 1995, the property is ordered to be divided into 5 equal shares and to allot one share to the final decree petitioner an one share to the 4th defendant. In O.S.No.125 of 1995, two items of

properties were ordered to be divided into two equal shares and one such share was alloted to the final decree petitioner therein and one share to the 4th defendant. The first defendant in the suit remained ex parte and some of the sharers did not pay the court fee. When final decree application was filed, the parties other than the one who had remained ex parte joined together and submitted a share list and requested the court below to effect a division in terms of the share list submitted by the parties. The court below did not accept it for the reason that it was not a petition filed by all the sharers and therefore it does not fulfill the conditions of the compromise and so behind the back of a person, the court cannot do as the petitioners want. One cannot hold that the said approach of the court is totally erroneous. But, at the same time, the first defendant, according to the learned counsel for the petitioners, is a person, who is unheard of more than 20 years and he has never participated in the trial or even now in the final decree proceedings. When such is the situation, a request is made to consider the share list.

2. I am conscious of the fact that just because a party is not before the court, his entitlement to the property cannot be taken away by the junction of others. But, at the same time, when the majority of the sharers canvasses for the possession that they are holding the property by way of their own

arrangements and that may be preserved, the court is bound to consider that aspect also.

3. Therefore, I feel that the following directions can be given to the learned Munsiff for a proper disposal of the matter. (1)Since the court has already appointed a new Commissioner to visit the property and as the share list submitted by the parties is available before court, the court may direct the Commissioner to set apart the property as stated in the share list and the share list which contains the property of the first defendant, who is not a party to the settlement be retained as an undivided share in the property.(2) The court shall see after receipt of the Commissioner's report whether by virtue of this share list division, the first defendant is handicapped or deprived of his legal entitlement over the property. Since all others have joined together and are satisfied with the respective allotments made to them in the share list even if there is any anomaly, that will not detain long because the parties had agreed to adopt such a recourse. (3) The Commissioner can also be directed to estimate the value of the property and if necessary, the parties, who are on the party array be heard and a final decree be passed in accordance with law. (4) I also direct the learned

Munsiff, Nadapuram to dispose of the matter within a period of two months from today.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-